

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

CLEARY SCHOOL FOR THE DEAF

And

Case 29–CA–163066

**NEW YORK STATE UNITED TEACHERS
AMERICAN FEDERATION OF TEACHERS,
NEA, AFL–CIO**

*Naoki P. Fujita Esq., and Tara
O'Rourke Esq., for the
General Counsel
Ian B. Bogaty Esq., for the
Respondent
Trudy Rudnick, for the Charging Party*

Decision

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on June 23, 2016, in Brooklyn, New York. The charge was filed on October 27, 2015, and the complaint was issued on February 19, 2016. In substance the complaint alleged that the employer's handbook, which employees are required to sign, contained a class action waiver.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

I. Jurisdiction

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(1), (6) and (7) of the Act.¹ I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Alleged unfair labor practice

The Respondent operates a school for the deaf. It has an enrollment of about 100 students and employs approximately 90 teachers. The Executive Director is Jacqueline Simms. Denise Boeckel is the administrative assistant to Simms.

¹ In its answer the Respondent asserted that it was not subject to the Board's jurisdiction because of its religious character. At the hearing, the employer withdrew that assertion and admitted that it was subject to the Board's jurisdiction.

A revised version of the Respondent's 2010 employee handbook was electronically distributed to its employees on September 25, 2015. This contained a provision titled "Resolving Disputes," which stated:

5 To assure individualized adjudication, any claim or dispute between us will be adjudicated solely by the School and by you in an individual action, not as a group, class or collective action or proceeding.

10 The document had a line for an employee's signature and date. It also stated; "Please sign and date this receipt and return it to the Director of Business Operations."

On the morning of September 22, 2015, Boeckel sent an email message with attachments to the employees of the Respondent. This stated:

15 Good morning. Attached is the new Employee Handbook. Please sign and return the "Employee Acknowledgment" that is also attached. All of the acknowledgments must be signed and returned; they will be placed in your personnel folder. Enjoy the rest of the day.

20 The attachments contained a copy of the revised handbook and an acknowledgement that the handbook had been received.

25 The handbook did not contain any provision that stated that employees were free to not sign the acknowledgement form or to otherwise refuse to agree to the class action waiver. Nor did it contain any type of arbitration provision.

30 Except for two employees, all of the remainder signed the class action waiver form. And with respect to a couple of employees who refused to sign, the company did not take any adverse action against them. Nevertheless, these exceptions do not mitigate against the fact that employees receiving the handbook could reasonably understand that signing the class action waiver was required. After all, they were instructed by email that the form "must be signed."

35 The decision in this case is controlled by the Board's decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied, 808 F.3d 1013 (5th Cir., Oct. 26, 2015). In *Murphy Oil* and subsequent cases, the Board has consistently held that asking employees to sign class action waivers, with or without an "opt out" clause, is a violation of Section 8(a)(1) of the Act. Moreover, this case doesn't even offer the defense that the provision is lawful because it is coupled with a provision requiring arbitration of disputes. Further, the waiver as written could
40 reasonably be read to preclude employees from filing charges with the National Labor Relations Board.

Conclusions of Law

45 By maintaining a provision in its employee handbook that requires employees to waive their right to bring class actions or to act concertedly in regard to their terms and conditions of employment, the Respondent has violated Section 8(a)(1) of the Act.

50

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ²

ORDER

The Respondent, Clearly School for the Deaf, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a policy that requires employees to waive the right to maintain class or collective actions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the class action waiver in all of its forms, or revise it to make clear to employees that the policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions.

(b) Notify all current and former employees who signed or otherwise became bound to the class action waiver policy, that it has been rescinded or revised and, if revised, provide them a copy of the revised policy.

(c) Within 14 days after service by the Region, post at its Long Island facilities, copies of the attached notices marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Employer's authorized representative, shall be posted by the Employer and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Employer has gone out of business or closed the facilities involved in these proceedings, the Employer shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since September 22, 2015.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated: Washington D.C. August 3, 2016

A handwritten signature in black ink, appearing to read "Raymond P. Green", written over a horizontal line.

Raymond P. Green
Administrative Law Judge

Appendix

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain and/or enforce a policy that requires employees to waive their right to maintain class or collective actions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the class action waiver in all of its forms, or revise it to make clear to employees that the policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions.

WE WILL notify all current and former employees who signed or otherwise become bound to the class action waiver policy that it has been rescinded or revised and, if revised, provide them a copy of the revised policy.

CLEARY SCHOOL FOR THE DEAF

(Employer)

Dated _____ By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Two MetroTech Center
Jay Street and Myrtle Avenue
Brooklyn, NY 11201-4201
(718) 330-7713, Hours: 9 a.m. to 5:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/29-CA-163066 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (718) 330-2862.